



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 770

RIN 1901-AA82

Transfer of Real Property at Defense Nuclear Facilities for Economic Development

AGENCY: Department of Energy

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting the interim final rule published on February 29, 2000, 65 FR 10685, as final, with changes. The final rule establishes a process for transferring unneeded real property at DOE defense nuclear facilities, for the purpose of promoting economic development, and prescribes the process by which the Secretary of Energy (or delegate) can grant discretionary indemnification.

EFFECTIVE DATE: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Department of Energy (DOE) published an interim final rule and opportunity for public comment on February 29, 2000, 65 FR 10685, and DOE received comments on the rule. After the issuance of the rule, there were two separate legislative amendments to the underlying statutory authority, and one of the legislative amendments required revising the regulation. Today DOE is adopting the interim final rule as final, with revisions to conform with the legislative amendment, and to provide clarification.

Section 3158 of the National Defense Authorization Act for Fiscal Year 1998, Public Law 105-85, directed the Department to prescribe regulations for the transfer, by sale or lease, of real property at DOE defense nuclear facilities for the purpose of permitting the economic development of the property (amended and redesignated at 50 U.S.C. 2811). 50 U.S.C. 2811(b) also provides that the Secretary of Energy may hold harmless and indemnify a person or entity against any claim to person or property that results from the release or threatened release of a hazardous substance or pollutant or contaminant resulting from DOE activities at the former defense nuclear facility on which the real property is located.

This final rule has been approved by the Office of the Secretary of Energy.

II. Comments on the Interim Final Rule

DOE invited public comment on the interim final rule, and received written comments from several interested organizations as well as individuals interested in the transfer of DOE real property at defense nuclear facilities for economic development. Most of the comments expressed support for the rule. A number of issues raised in the comments were resolved by the passage of statutory amendments that clarified that indemnification will apply to future transferees; these revisions are reflected in the revised regulation. DOE has adopted the comment to clarify that “local government” will be notified regarding any unneeded property. In

appropriate circumstances, DOE will also notify Tribal nations regarding unneeded property.

III. Discussion of Amendments

In today's final rule DOE is revising certain sections of the interim rule to reflect statutory amendments that were made after February 29, 2000. None of the regulatory changes in this notice of final rulemaking alter substantive rights or obligations under current law.

Section 506 of the Consolidated Appropriations Resolution, 2003, Title V (P.L. 108-7) (February 20, 2003) amended section 3158, by clarifying that if indemnification is provided by DOE, such indemnification will also be provided to "any successor, assignee, transferee, lender or lessee" of the entity that initially acquires ownership or control. Accordingly, DOE added a new section 770.9(e) to clarify that any indemnification provided by DOE to an entity is transferable to a successor entity. Later legislation further clarified that the section 506 amendment was effective for any transfers as of, the date of the enactment of the National Defense Authorization Act for Fiscal Year 1998, which was November 18, 1997. (Section 504 of the Energy and Water Development Appropriation Act, 2004, Title V (P.L. 108-137) (December 1, 2003)). No regulatory amendment is necessary for the legislative change under the Energy and Water Development Appropriation Act, 2004

DOE added the phrase "closed or downsized" before the term "defense nuclear facilities" in sections 770.1 and 770.2 to clarify that this rule applies only to unneeded real property assets. DOE added the phrase "and for facilitating local reuse or redevelopment" in section 770.2(b), to emphasize that the purpose of the transfers is to enable reuse or redevelopment of the transferred property.

We revised the definitions in 770.4 to be consistent with terminology used in current DOE directives. We added language in section 770.5 to clarify that local governments will be

advised regarding the availability of real property. In section 770.7 the revisions clarify the conditions regarding economic development and reuse of the DOE properties.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>.

Today's final rule concerning the sale or lease of real property at defense nuclear facilities is not subject to the Regulatory Flexibility Act because neither the Administrative

Procedure Act (5 U.S.C. 553(a)(2)), nor any other law requires DOE to propose the rule for public comment. Consequently, this rulemaking is exempt from the requirements of the Regulatory Flexibility Act.

C. Review Under the Paperwork Reduction Act

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969. 42 U.S.C. 4321 et seq. This interim final rule establishes procedures for real property transfers for economic development. Because the rule is procedural, it is covered by the Categorical Exclusion in paragraph A6 of Appendix A to Subpart D, 10 CFR Part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required. Individual proposals for the transfer of property are subject to appropriate NEPA review. 10 CFR 770.3(b).

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking

discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable

standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law; this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995.

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. DOE has determined that today's regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guideline issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB

and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Applicability of Executive Order 13175

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, Nov. 9, 2000) and implementing guidance from the Office of Management and Budget (M-10-33, July 30, 2010) require consultation with tribal officials in the development of regulations in two particular circumstances. Specifically, consultation is required if a regulation imposes unfunded mandates on tribes

or preempts tribal law. In such cases, when an agency submits a draft final regulation to OMB for review under Executive Order 12866, the agency must include a “tribal summary impact statement” in a “separately identified portion of the preamble to the regulation”. The OMB guidance further details the contents of the tribal summary impact statement. DOE has determined that this regulation neither imposes an unfunded mandate on tribes nor preempts tribal law. Therefore, tribal consultation was not conducted prior to issuance of the rule.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today’s final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 801(2).

List of Subjects in 10 CFR Part 770

Federal buildings and facilities.

Issued in Washington, D.C. on November 1, 2013.

Ingrid Kolb
Director, Office of Management

For the reason set forth in the preamble, the interim rule which was published at 65 FR 10685 on February 29, 2000 is adopted as a final rule with the following changes:

**PART 770 –TRANSFER OF REAL PROPERTY AT DEFENSE NUCLEAR
FACILITIES FOR ECONOMIC DEVELOPMENT**

1. The authority citation for part 770 is revised to read as follows:

Authority: 50 U.S.C. 2811.

§ 770.1 [Amended]

2. Section 770.1(a) is amended by adding “closed or downsized” after “real property at”.

3. Section 770.2 is amended by:

- a. Adding, in paragraph (a), “closed or downsized” after “sale or lease at”; and
- b. Revising paragraph (b) to read as follows:

§ 770.2 What real property does this part cover?

* * * * *

(b) DOE may transfer, by lease only, improvements at defense nuclear facilities on land withdrawn from the public domain, that are unneeded, temporarily underutilized, or

underutilized, for the purpose of permitting economic development and for facilitating local reuse or redevelopment.

4. Section 770.4 is amended by:

a. Adding in the definition of “*Community Reuse Organization or CRO*”, the words “that is recognized by DOE and” after “non-governmental organization”, and removing “and that has the authority to enter into and fulfill the obligations of a DOE financial assistance agreement.”

b. Adding in the definition of “*Economic Development*,” the words “or which furthers reuse or redevelopment,” after “surrounding region(s)”;

c. Removing the definition of “*Excess Real Property*;”

d. Adding, in the definition of “*Underutilized Real Property or Temporarily Underutilized Real Property*” after the first sentence, “Underutilized property is available by lease only.”

e. Adding in alphabetical order the definition of “*Unneeded Real Property*” to read as follows:

§ 770.4 What definitions are used in this part?

* * * * *

Unneeded Real Property means any property under DOE control that the Field Office, cognizant program, or the Secretary of Energy have determined, according to applicable procedures, to be no longer needed for the purposes of conducting DOE business.

§ 770.5 [Amended]

5. Section 770.5(a) is amended by adding in the first sentence ", local government," and "Tribal nations," after "Community Reuse Organizations".

6. Section 770.7 is amended by:

- a. Revising paragraphs (a)(1)(ii) and (iii);
- b. Removing in paragraph (b) "Within 90 days after receipt of a" and adding "After review of the" in its place.
- c. Removing paragraph (d).

The revisions read as follows:

§ 770.7 What procedures are to be used to transfer real property at defense nuclear facilities for economic development?

(a) * * *

(1) * * *

(ii) The intended use and duration of use of the real property, including potential users and an indication that these users are interested in participating in the economic development of the property;

(iii) A description of the economic development that would be furthered by the transfer (e.g., jobs to be created or retained, improvements to be made) or what reuse or reutilization would be accomplished by means of a description of the business to be created (direct and indirect economic benefits that will result due to the proposed transfer);

* * * * *

7. Section 770.9 is amended by adding paragraph (e) to read as follows:

§770.9 What conditions apply to DOE indemnification of claims against a person or entity based on the release or threatened release of a hazardous substance or pollutant or contaminant attributable to DOE?

* * * * *

(e) Any indemnification provided will apply to any successor, assignee, transferee, lender or lessee of the original entity that acquires ownership or control.

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